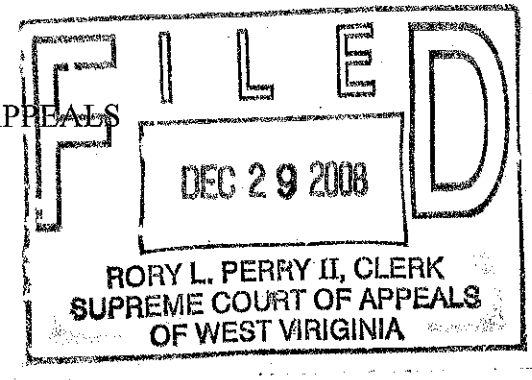
APPEAL NO. 34495

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA



BARBARA WARNER, and
ROY WARNER,

Petitioners,

v.

Civil Action No. 06-C-216
Circuit Court of Randolph County

LEROY WINGFIELD, JR., and
SUSAN WINGFIELD,

Respondents.

FROM THE CIRCUIT COURT OF RANDOLPH COUNTY
WEST VIRGINIA

APPELLEE'S WARNER'S BRIEF

JEFFERSON L. TRIPLETT
Triplett & Triplett, L.C.
317 Henry Avenue
P.O. Box 1365
Elkins, WV 26241
Phone/Facsimile: (304) 636-7335
Email: jeff@triplettlawoffices.com

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I. INACCURACIES IN APPELLANT'S STATEMENT OF THE CASE.

1. Appellant inaccurately represented the extent of her communications with Appellee's Warner prior to the filing of the Complaint on or about October 2, 2006. First, on page 1 under the "Statement of the Case," Appellant states that *"[t]he Warner's were scheduled for an initial consultation with Attorney Klie. Ms. Klie became held up in Court and her paralegal began the meeting with the Warners, obtaining basic information. Attorney Klie arrived late and met with the Warners."* Next, on page 2, lines 2 & 3, Appellant states that *"[t]hroughout the course of preparing the complaint Attorney Klie had several telephone conversations with the Warners."* Finally, in the third paragraph of "ARGUMENT" in her brief, Appellant states that she "discussed the mater [sic] at length with her clients [the Warners]." While Appellees Warner agree that they often spoke with members of Appellant's staff, prior to the filing of their complaint on October 10, 2006, they did not speak or meet with Appellant one time during that period. In fact, Appellees Warner did not speak with Appellant until their first meeting with Appellant, on about November 17, 2006, nearly 40 days after the filing of the complaint.
2. Appellant inaccurately states that the she spent three hours with Appellees Warner in preparation for their deposition, to be taken by Attorney Steve Jory. Appellees Warner specifically recalls this meeting lasting less than one hour. The meeting was scheduled to begin at 4:00 p.m., and Appellant directed Appellees Warner to review a videotape on deposition preparation. This videotape (given to and still in the possession of Appellees Warner) lasted less than 30 minutes long; following the videotape, Appellees Warner met with Appellant for less than 30 minutes. Appellees' Warner specifically recalls Appellant and her staff wanting to close the office no later than 5:00 p.m.

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Plaintiffs / Appellees,

VS

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LEROY WINGFIELD, JR., and
SUSAN WINGFIELD,

Defendants / Appellees.

APPELLEES WARNER'S BRIEF

DISCUSSION

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING SANCTIONS IN THE FORM OF ATTORNEY FEES AGAINST PLAINTIFFS' FORMER COUNSEL.

The trial court acted within its discretion in making its ruling, as contained in its Order, entered on December 12, 2007. First, and perhaps most importantly, the Court questioned Appellant's candor, on the issue of her time spent on this case and the thoroughness of her investigation of the facts – the outcomes of which bore directly on the trial court's decision to award sanctions. Having found reason to question Appellant's candor on these crucial issues, the Court acted within its discretion to assign appropriate weight to Appellant's representations on these, as well as other issues.

As a result, the Court accepted the proffers of Appellees Warner as more credible than the statements of Appellant herself. Many of the proffers of the Warners' testimony focused on the amount of time Appellant spent with them and the extent of Appellant's investigation of the Warners' claims. Having thoroughly reviewed the file, the pleadings filed by each

Party, and the outcome of the case, the Court ultimately found that Appellant "*utterly failed to make an 'inquiry reasonable under the circumstances,' as required by Rule 11(b) of the West Virginia Rules of Civil Procedure*."

An analysis of several of Appellant's representations will demonstrate (1) how the trial court reached its conclusions about Appellant's inadequate investigation of this matter and her gross overstatement of time spent on the case; (2) how Appellant badly damaged her own credibility throughout the litigation of the issues of sanctions and attorney fee issues in this case; (3) how the trial court focused the issue of sanctions squarely on Appellant; and (4) that the trial court was justified in imposing sanctions on Appellant.

a. Unsubstantiated representations about Appellant's time spent with on the Warners' case.

In its written opinion, entered on December 21, 2007, the Circuit Court spent considerable time discussing what it considered to be misrepresentations by Appellant as to her time spent on Appellees Warners' case. This discussion stems from Appellant's representations to the Court, during oral argument, on April 17, 2007, on which date Appellant made the following statement, in response to argument by counsel for Appellees Warner (the undersigned counsel) that Appellant had spent less than three (3) hours with them throughout her seven-month representation of them:

> ATTORNEY KLIE: "I pulled the time sheets last night on this particular case and I spent one hundred and fifty-three (153) hours on this case...twenty (20) hours of which involved meetings and telephone calls with Mr. and Mrs. Warner. The allegation that I've only met with them three (3) hours ... is simply not true. I met with them for three (3) hours ... missed a Doctor's appointment to stay there and make sure they ... they understood the seriousness of the allegations and the Motion to Continue...I have spent countless hours with Mr. and Mrs. Warner, and they never expressed a dissatisfaction as to what I was doing until Mr. Jory filed the Motion for Summary Judgment."

See Transcript of April 17, 2007 hearing, at pages 20 (line 18) – 21 (line 9), attached hereto as **Exhibit 1.**

Following this hearing, however, despite her representations, Appellant was unable to produce any substantive or descriptive time record or sheet to account for her time spent on this case throughout the remainder of this proceeding in trial court. The undersigned counsel and his staff members specifically made seven separate requests for copies of the "time sheets" that Appellant referenced in her argument at the hearing on April 17, 2007, but Appellant provided none.

The only records that were ever produced, however, were produced by Appellees Warner; they were able to produce Appellant's monthly billing statements from the start of the representation in August 2006 through October 2006. These records account for only 12.4 hours of Ms. Klie's time; the last billing statement shows that the Warners had $405 remaining on their $1,500 retainer fee, as of November 1, 2006. These billing statements are attached as **Exhibits 2-4.** As evidenced by Appellant's ability to produce any billing records for her work in this case, Exhibits 2 – 4, received by Appellees Warner from Appellant in 2006, is the only evidence of billing records generated by Appellant in the original litigation.

If Appellant was telling the truth at the April 17, 2007 hearing, that she reviewed the time sheets for 153 hours, then why could she not produce **any** of them after the hearing? It is inconceivable that Appellant would destroy those records following the hearing.

As a result of her failure to substantiate her claims of time spent, the Circuit Court properly concluded and noted, in its final Order, as follows:

> "The lack of thorough preparation in this matter is especially disconcerting once the Court takes into consideration [Appellant]'s claim that she spent approximately 153 hours working on this case. [Appellant] proffered this information to the Court on two separate occasions, but could not produce any documentary evidence for that basis of such claims. The only billing records submitted by [Appellant] are for a total of 12.4 hours for the period through the end of October 2006, leaving over 140 hours unaccounted for. Although [Appellant] said in April that she reviewed the time sheets to get the 153 hour figure, she has never produced them. At the hearing on August 27, 2007, she said that the 153 hour figure was merely an estimate. These statements leave much to be desired. Nothing contained in the file would even remotely justify her claims of 153 hours of work. In these months after the hearing, the Court,

> regrettably, has seriously questioned the accuracy and truthfulness of [Appellant]'s statements to the Court. The Court thoroughly reviewed a transcript of the hearing and questioned [Appellant]'s candor with the Court.
>
> The Court notes that Ms. Klie produced no evidence to support her claim. [She] could not produce any work product. Indeed, she could not even produce time sheets verifying the amount of time spent on this case. Time sheets are of paramount importance to a law practice. Mr. Jory [counsel for Appellees' Wingfield] submitted his time sheet records to the Court, indicating, that as of April 17, 2007, he had spent 54.1 hours investigating, preparing discovery, filing a motion for summary judgment in this matter, and filing the motion for sanctions. In the Court's opinion, Mr. Jory's time expenditure seems completely reasonable in light of his records and his work product. On the other hand, Ms. Klie reports her hours at three times that of Mr. Jory, yet she has absolutely nothing to show for it. In Defendants' Memorandum Regarding Sanctions, Mr. Jory referred to the 153 hour claim by [Appellant] as 'totally fabricated.' This Court finds no evidence to disagree with Mr. Jory's assessment." (emphasis added)

See Circuit Court Order, entered 12/21/07, at pages 5 – 6. Clearly, the trial court noted the incongruence between the time Appellant allegedly spent on the case and the content of the file and the final outcome of the case for the Warners.

On page 2 of Appellant's Brief, in the "Statement of the Case," Appellant states that "[d]uring the discovery process the retainer fee paid by the Warners was exhausted, at which time [Appellant] agreed to continue representation of the Warners on a contingency basis." Exhibit 4 reveals that, as of November 1, 2006, Appellees Warner still had $405 remaining on their retainer fee; at this point, Appellant was two-and-a-half months into her representation of the Warners, which representation lasted until about April 3, 2007. On page 5 of Appellant's Brief, Appellant justifies her lack of billing record documentation as follows: *"...there was no documentary evidence as to the time because the majority of this matter was handled on a contingency basis and therefore time logs were not kept."* This is not a true statement, as Exhibits 2 – 4 reveal; these three Exhibits are copies of the actual monthly statements from Appellant's office that were sent to the Warners'; these statements provide the amount of time spent by Appellant each month. Therefore, according to the records, it is obvious that Appellant was keeping some form of records to record her time, at least through the end of October. Based on Appellant's representation, as to the non-existence of time logs, how else would Appellant

know when the retainer fee was finally exhausted and that it was necessary to enter into a contingency fee arrangement?

Appellant's unsubstantiated representations about her time spent on this case clearly damaged her credibility as to statements concerning the thoroughness of her investigation. Her damaged credibility, on this issue, without a doubt, contributed to a number of adverse findings, when her proffers conflicted with those of opposing counsel.

b. Unsubstantiated representations about her investigation of the facts of the underlying case.

Considering Appellant's misrepresentations as to her time spent on the underlying matter, the Court simply did not believe Appellant Klie, when she stated her substantial efforts to investigate the Warners' case, before filing the complaint. In considering the conflicting proffers of counsel, the Court apparently believed the Warners' proffer – which Appellant Klie did not personally meet with the Warners' until November 17, 2006, or about 38 days after the filing of the Warners' five-count complaint.

In Appellant's Brief, however, on pages 1 – 2, Appellant asserts that she met briefly with Appellees Warner at the initial consultation and that, from that point forward, throughout the course of preparing the complaint, Appellant had several telephone conversations with the Warners. On April 17, 2007, appellant made a consistent representation to the trial court, during the following exchange:

> THE COURT: Is it true that you first met [with Appellees Warner] on November 17th of 2006, but the Complaint was filed on October the 10th of 2006?
>
> APPELLANT: Your Honor, it ... that is not true... I have actually, ... just been informed yesterday that that allegation was going to be made ... I do have both of my full-time Staff Members in the hallway who have not been in here for this hearing who are prepared to testify. The circumstances around Mr. and Mrs. Warner retaining me was that I had scheduled a consultation with them ... got held up in Judge Alsop's Court in Webster County ... was traveling back, and my Legal Assistant took it up on herself to go ahead, and sit down with them and start going over the facts ... I came into the meeting late. My assistant,

> Melissa, explained to me the facts that Mr. and Mrs. Warner had told her, and I asked a few additional questions. Then, throughout the course of me preparing a Complaint I didn't see them face to face I did make phone calls to their home, and asked them a few different questions."

See Transcript of April 17, 2007 Hearing, at page 20, attached hereto as **Exhibit 1**.

As noted above, Appellee's Warner strongly disagrees with Appellant's representations as to the date of their first contact with Appellant. In serious doubt as to "[Appellant's] candor with the Court" and "question[ing]...the accuracy and truthfulness of [Appellant]'s statements to the Court," the trial court apparently found the proffers of Appellee Warner to be more credible than Appellant's representations on this issue. Had she produced time records to substantiate her activity, from the time of being retained up through the time of converting to a contingency fee, the Court may have reached a different conclusion.

Assuming, *arguendo*, that had the trial court found Appellant's above statements to be credible, the trial court could still have easily found, within its discretion, that Appellant's investigation, as described – "ask[ing] a few additional questions [at the initial consultation] ... [not seeing] them face to face ... mak[ing] phone calls to their home [to ask] them a few different questions" – hardly constitutes a "reasonable inquiry" as contemplated by Rule 11(b) of the W.Va. Rules of Civil Procedure for a five-count complaint.

As to the thoroughness of Appellant's investigation, the Court found, in page 5 of the final Order, as follows:

> "Prior to filing the Complaint, [Appellant] failed to do a cursory investigation of the claims contained therein. Count 3 of the complaint, for assault, was voluntarily dismissed because [Appellant] did not investigate the allegation. [Appellant] says this error was due to a miscommunication, but has no explanation for such miscommunication. As indicated previously, all claims contained in the Complaint were admitted by the Plaintiffs to be false. Had [Appellant] done her work on the case, she would have realized the claims were wholly without merit. The Court can only speculate as to why [Appellant] did not investigate the claims contained in the Complaint, but will not do so. The lack of thorough preparation in this matter is especially disconcerting once the Court takes into consideration [Appellant]'s claim that she spent approximately 153 hours working on this case."

As a result of not having met with Appellant prior to mid-November 2006, the Warners did not review their own complaint, as prepared by Appellant and members of her staff;

consequently, the Warner's signed no affidavit or verification as to the truth of the Complaint's contents. As a result, the Court will find that no affidavit accompanies the Warners' Complaint against the Appellees Wingfield. This factor supports the trial court's finding that Appellant "utterly failed to make an 'inquiry reasonable under the circumstances' as required by Rule 11(b) of the West Virginia Rules of Civil Procedure."

c. Misrepresentations to her clients – withholding essential information.

i. Communication from the Court.

On December 8, 2006, this Court personally wrote Appellant Klie a letter, in response to her motion for a continuance, in which the Court stated as follows: *"It is obvious that you are very busy practicing law in a number of jurisdictions, and I am certainly happy for your professional success. However, I want you to ask yourself and make sure that you have enough time to properly represent your clients in this case."* At that point, Appellant had not yet even appeared before the Court in this case, but the Court could already see a problem. *See* **Exhibit 5.**

Although the letter was likely embarrassing to her, Appellant had an obligation to share this letter with the Warners', as it pertained to their case. Nonetheless, Appellant never provided them with a copy of this letter. Appellant provided rationale of a series of unfortunate events, none of which, however, truly justifies this letter not being sent to the Warners', especially when every other piece of correspondence and pleading was timely provided to the Warners'. As a result, the Warners' had no idea of this Court's perceptions as of that early date. In fact, the Warner's never saw a copy of this letter prior to their releasing Appellant as counsel. Appellant never discussed it with them and never showed it to them. Appellant did not even provide them with a copy of this letter with the $74 copy of the file that the Warner's purchased from her

office when they released her as counsel. Appellant and her staff specifically and intentionally omitted this letter from copy of the Warners' case file.

How did the Warner's learn about this letter? They obtained a copy of it from the Circuit Clerk's office, around the time that they released Appellant as their counsel in early-April 2007. With the exception of copies of medical records and other miscellaneous papers, the file copy provided to the Warner's from Attorney Klie's office mirrored the file as maintained by the Circuit Clerk, **with the exception of the December 8, 2006 letter from the Court.**

Had the Warner's seen the letter or had some indication that Ms. Klie was not performing adequately in the case; the Warner's would likely have made a change in counsel.

ii. Counter-offer from Defendants, dated February 7, 2007.

Following the depositions of Appellees Warner on or about February 6, 2007, Appellant made a settlement proposal to defense counsel, Attorney Stephen Jory. By letter dated February 7, 2007, Mr. Jory informed Appellant that Appellees Wingfield/Defendants rejected Appellant's settlement proposal and proposed a settlement counter-offer. According to the Appellees Warner and according to the file copy that Appellant provided Appellees Warner/Plaintiffs, Appellant Klie did not communicate this counter-offer to Appellees Warner. In fact, the Appellees Warner assert that, from the date of their deposition on February 6, 2007, Appellant had no communication with them until late-March 2007, when Klie contacted them to strongly recommend that they dismiss their lawsuit. Further, a thorough inspection of the file copy that the Warners obtained from Appellant (at a cost of over $70) revealed that Appellant sent no correspondence to the Warners to inform them of the Defendants' counter-offer.

d. Appellant requested that any sanctions ordered be against her, not the Warners.

At the hearing on April 17, 2007, Appellant accepted responsibility for any Court-ordered sanctions. In doing so, Appellant stated that "*if the Court believes I've done something wrong in this case I would ask them to issue sanctions against me not against Mr. and Mrs. Warner. Mr. and Mrs. Warner have done nothing wrong in my opinion although I think that I have done nothing wrong either.*" *See* Transcript from Circuit Court Hearing, dtd 4/17/2007, at pg. 23, lines 1-5, attached hereto as Exhibit 1.

e. Appellees Warner had at least a justiciable claim that was never asserted by Appellant; as a result, this justiciable claim was lost.

Appellee's Warner and the undersigned counsel verily believe that Appellees Warner have or had grounds for a justiciable claim against Appellees Wingfield/Defendants, which claim could have been rooted in the theory of nuisance, diminution of the market value to their home, or specific performance to force Defendants to take certain action to remove the graffiti from the Warners' side of their fence.

As in any case, the proper route of litigation to be taken would be decided after a careful and informed review by counsel and balanced with the relief desired by the clients. Unfortunately, in this case, however, these potential avenues were apparently never adequately explored by Appellant in her investigation of the case. The complaint filed on behalf of Appellees Warner, however, did not seek any relief on these grounds. Apparently, these potential claims were never considered by Appellant.

f. Sound precedent supports the trial court's ruling.

In imposing sanctions, the trial court acted within its discretion in relying on *State ex rel. Roy Allen S. v. Stone*, 196 W.Va. 624 (1996) and *Pritt v. Suzuki Motor Co., Ltd.*, 204 W.Va. 388, (1998) to supports its ruling. These two cases fully-support the trial court's ruling to impose Rule 11 sanctions on Appellant, in light of its extensive findings, as explained on pages 4 and 5 of the trial court's final Order.

g. *Incomplete representations by Appellant to this Court.*

During oral argument before this Court, on October 28, 2008, this Court inquired as to why and how the trial court found bad faith to be present in this case. Appellant's counsel stated as follows:

> *"The focus of the inquiry concerning that there was bad faith, the only one that I can perceive, is that they focused on billing records. Initially, Attorney Klie took the case on a contingent fee contract – on a retainer fee and I think she took in $1,200. At some point, within the first 12 to 14 hours, those funds were gone. She then began to take the case on a contingent fee basis, and because only 12 billable hours were shown, she represented to Judge Henning and that Court that, in total time, she had closer to 153 hours. I think that approximately 4 to 6 months elapsed between the time the retainer fee ran out and the work on the contingent fee basis and because she was not able to document that. It felt that she failed to exercise due diligence and evidently rose to somehow oppressive conduct and/or bad faith."*

In responding to this Court's inquiry, Appellant's counsel explained one aspect of one issue that disturbed the trial court – Ms. Klie's clear and bad faith misrepresentation to the trial court as to the amount of time that she had spent on this case. Appellant's counsel did not provide the full context of the discussion of this issue, as set forth in Subsection I.i., *supra*. Instead, Appellant's Counsel simply suggested that Ms. Klie spent the large majority of her 153 hours of work in this case was performed over the course of her last four to six months in the case. In doing so, Appellant's Counsel failed to address Ms. Klie's misrepresentation, in open

court, that she had reviewed time sheets that documented her 153 hours of work in the case. The truth of the matter – as revealed by Ms. Klie's inability to produce such records – is that the time sheets, to which she referred, did not actually exist.

Further actions and circumstances that that damaged Ms. Klie's credibility before the trial court, which Appellant's Counsel did not address, include:

a. Ms. Klie's failure to meet with Mr. and Mrs. Warner until 40 days after the filing of the Warners' Complaint in the Circuit Court of Randolph County, described more fully, *supra*, in subsection I.b. and II.1.(b. – c.);

b. Ms. Klie's unsubstantiated representations about her investigation of the facts of the underlying case, described more fully, *supra*, in subsection II.1.b.;

c. Ms. Klie withholding very important information from Appellee's Warner during her representation of them, as described more fully, *supra*, in subsection II.1.c. This information included:

    i. a personal letter written by Judge Henning to Ms. Klie on December 8, 2006, in which Judge Henning actually wrote: "*It is obvious that you are very busy practicing law in a number of jurisdictions, and I am certainly happy for your professional success. However, I want you to ask yourself and make sure that you have enough time to properly represent your clients in this case.*"

    ii. A settlement offer from Defendant/Appellees Wingfield.

The response of Appellant's Counsel to this Court's inquiry was incomplete and out of proper context. A review of trial court transcript and the trial court's order, entered on December 21, 2007, will enable this Court to understand the full and proper context of Ms. Klie's inaccurate representations, the trial court's concerns, and the basis for the trial court's ruling.

CONCLUSION AND PRAYER FOR RELIEF

The trial court did not err or otherwise abuse is discretion in ruling that Appellant Erika Klie be sanctioned in the amount of $12,236.33, the reasonable amount of the attorney fees of Appellees

Wingfield, as a result of her conduct in attempting to represent the interests of Appellees Warner in the underlying litigation of this case. As a result, the ruling of the Circuit Court of Randolph County should be AFFIRMED.

Very respectfully submitted,

BARBARA AND ROY WARNER,
Appellees,

By Counsel

Jefferson L. Triplett
W.V. STATE BAR NO. 8988
COUNSEL FOR APPELLEES WARNER
TRIPLETT & TRIPLETT, L.C.
ATTORNEYS AT LAW
317 HENRY AVENUE
P. O. BOX 1365
ELKINS, WV 26241
(304) 636-7335 (PHONE/FAX)

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Defendants / Appellees.

CERTIFICATE OF SERVICE

I, Jefferson L. Triplett, Triplett & Triplett, L.C., counsel for Plaintiffs, BARBARA WARNER and ROY WARNER, do hereby certify that on this date we served a true copy of the foregoing **"APPELLEES WARNER'S RESPONSE TO APPELLANT'S BRIEF"** upon the Parties to this action, by facsimile and by depositing copies in the United States Mail, with postage prepaid in envelopes addressed as follows:

Stephen G. Jory, Esquire
McNeer, Highland, McMunn and Varner, L.C.
P.O. Box 1909
1 Randolph Avenue
Elkins, WV 26241

Ronald Zavolta
Zavolta Law Office
1609 Warwood Ave.
Wheeling, WV 26003

DATED this 26th day of December, 2008.

JEFFERSON L. TRIPLETT